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No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

HAROLD PERLSTEIN, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether 42 United States Code 1396h(b)(1) prior to its amendment in 1977 proscribed payments received by an administrator of a nursing home from a supplier of pharmaceutical supplies to the nursing home where the Government introduced no proof whatsoever that it had suffered any pecuniary loss or harm from said payments.

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Argument I

The United States Court of Appeals for the Sixth Circuit erroneously decided an important question of Federal law in construing 42 United States Code 1396h(b)(1) in conflict with decisions of United States Court of Appeals for the Fifth Circuit and United States Court of Appeals for the Second Circuit which now requires this Honorable Court to resolve the conflict which has arisen in the Circuit Courts of Appeals on this important question of Federal statutory construction.

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The Petitioner, Harold Perlstein, by his attorneys, Ivan E. Barris and Michael H. Golob, respectfully prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit on October 8, 1980.

OPINIONS BELOW

The Judgment and Commitment of the United States District Court for the Eastern District of Michigan, Southern Division is unreported, but is set forth in Appendix A herein.

The Opinion of the United States Court of Appeals for the Sixth Circuit is unreported at the present time, but is set forth as Appendix B herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 8, 1980. The jurisdiction of the Court is invoked under Title 28, United States Code 1254(1).

STATUTE INVOLVED

42 United States Code 1396h(b)(1).

SUMMARY OF THE CASE

Petitioner, Harold Perlstein, was indicted on June 28, 1978 for the alleged receipt of kickback payments involving Medicaid moneys in violation of 42 United States Code 1396h(b)(1).

On July 16, 1979, the jury returned guilty verdicts on all of the kickback counts of the Indictment.

On September 21, 1979, the Petitioner was sentenced to one (1) year incarceration on each of the sixteen (16) counts of receiving kickback payments to be served concurrently, and pay a committed fine of Four Thousand Dollars ($4,000.00)

on each count for a total fine of Sixty-four Thousand Dollars ($64,000.00).

On October 8, 1980, the United States Court of Appeals for the Sixth Circuit issued its Opinion affirming the conviction of the Petitioner herein.

STATEMENT OF THE CASE

This case arose from a Grand Jury investigation of the Hamilton and Avonside Nursing Homes located within the eastern district of Michigan. The nursing homes provided various medical services to individuals which were reimbursable under the Medicaid program. The Petitioner was the administrator of both the Hamilton and Avonside Nursing Homes for the relevant time periods in question.

In conjunction with his role as administrator of the nursing homes, the Petitioner was in a position to select which suppliers would ultimately service the nursing homes. The indictment charged that the Petitioner received Four Hundred Sixteen Dollars ($416.00) worth of liquor each month from Arnolds, Inc., the supplier of pharmaceutical supplies to the nursing homes, for the time period spanning August of 1974 through December of 1975.

At trial, the chief witness for the Government was Edmund Faudman, the former vice president of Arnolds, Inc. in charge of pharmacy accounts. Faudman had earlier pleaded guilty to paying kickbacks to various nursing homes, and as part of his plea bargain, was testifying against the Petitioner in the instant cause.

Faudman testified that Arnolds, Inc. had purchased the Tri-Med Company in 1974 which had been servicing the nursing homes in which the Petitioner was the administrator. The arrangement that Tri-Med had with the Petitioner was that

Tri-Med would pay the Petitioner a percentage of the volume of business given by the nursing homes to Tri-Med. Faudman immediately informed Petitioner that Arnolds, Inc. would not engage in the percentage payment arrangement which Tri-Med had with the nursing homes. Faudman testified that Petitioner then suggested that Arnolds give him a quantity of liquor each month.

After Faudman and Petitioner negotiated the amount of liquor to be given to Petitioner each month, Petitioner received Four Hundred Sixteen Dollars ($416.00) worth of liquor each month from Arnolds, Inc. beginning in August of 1974 and continuing through December of 1975 when Faudman left Arnolds, Inc.

When Faudman left Arnolds, Inc., Faudman's successor at Arnolds, went to Petitioner in an effort to retain the nursing homes' accounts for Arnolds. When Petitioner was informed by Faudman's successor that Arnolds would no longer be paying the Four Hundred Sixteen Dollars ($416.00) per month in liquor, Petitioner indicated that without the liquor Arnolds would no longer be servicing the nursing homes. Shortly after this conversation between Petitioner and Faudman's successor, Arnolds was dropped by Petitioner as the supplier of pharmaceutical supplies to the nursing homes.

Finally, Faudman had testified that Arnolds, Inc. would bill Medicaid directly for the supplies which it had given to the Medicaid nursing homes patients. The Government introduced no proof whatsoever that it had suffered any pecuniary loss or harm from these arrangements.

After the Government had rested its case in chief, the defense made a motion for judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. In essence, the defense contended that the Government had failed to prove the essential element of a bribe or kickback as required by 42

United States Code 1396h(b)(1). The Trial Court denied said motion.

On appeal to the United States Court of Appeals for the Sixth Circuit, the Sixth Circuit affirmed the conviction by broadly construing the terms bribe or kickback contained in the statute in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Porter* 591 F.2d 1048 (5th Cir. 1979) and the decision of the Second Circuit in *United States v. Zacher*, 589 F.2d 912 (2nd Cir. 1978).

In its decision, the Sixth Circuit expressly rejected the decision of the Fifth Circuit in *Porter, supra*, while adopting the opinion of the Seventh Circuit in *United States v. Hancock*, 604 F.2d 999 (7th Cir. 1979), which opted for a much broader construction of the terms bribe or kickback contained in the statute.

REASON FOR ALLOWANCE OF THE WRIT

ARGUMENT

I

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONSTRUING 42 UNITED STATES CODE 1396h(b)(1) IN CONFLICT WITH DECISIONS OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WHICH NOW REQUIRES THIS HONORABLE COURT TO RESOLVE THE

CONFLICT WHICH HAS ARISEN IN THE CIRCUIT COURTS OF APPEALS ON THIS IMPORTANT QUESTION OF FEDERAL STATUTORY CONSTRUCTION

In regard to the legal issue presented in this Petition, there has been no shortage of recent decisions concerning the proper construction of the terms bribe or kickback within the meaning of 42 United States Code 1396h(b)(1). The Second Circuit in *United States v. Zacher*, 581 F.2d 912 (2nd Cir. 1978) and the Fifth Circuit in *United States v. Porter*, 591 F.2d 1048 (5th Cir. 1979), have opted for a narrow reading of the operative terms. On the other hand, the Seventh Circuit in *United States v. Hancock*, 604 F.2d 999 (7th Cir. 1979) and the Sixth Circuit in *United States v. Tapert*, 625 F.2d 111 (6th Cir. 1980), and the present case have rejected the *Porter* decision by broadly construing the terms bribe or kickback.

At the outset, it should be noted that the Statute in question, 42 United States Code 1396h(b)(1) was materially amended and clarified in 1977. The 1977 material rewriting of the Statute completely vindicates the Petitioner's position that the Statute in effect at the time of his conduct did not apply to the payments which he received from Arnolds, Inc. In pertinent part, the amended Statute, 42 United States Code 1396h(b)(1)(A), provides as follows:

> §1396h. Offenses and penalties
>
> (b)(1) Whoever solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind —
>
> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, ...

> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

The material amendment of this statute in 1977 was a major reason that the Fifth Circuit in the *Porter* decision narrowly construed the terms bribe or kickback under the earlier statute. In *Porter, supra*, the Fifth Circuit logically pointed out that if the meaning of the 1972 version of this Statute at issue in this Petition was not clear and precise to the Congress and to the United States attorneys entrusted with enforcing the law, then it cannot be stated that the statute can be safely applied to conduct occurring prior to the amendment of the statute. *United States v. Porter, supra*, at 1054.

Turning to the factual situation in the Second Circuit decision of *United States v. Zacher, supra*, the defendant therein was the administrator of a nursing home in the State of New York which accepted both private and Medicaid patients. Zacher was charging his private patients the rate of Twenty-nine Dollars ($29.00) daily, but Medicaid would only reimburse the nursing home at the maximum rate of Twenty-five Dollars ($25.00) per day. Zacher met with several of the families of prospective Medicaid patients and indicated that if each family would pay him the sum of Four Dollars ($4.00) per day as a supplement to make up the difference between the rate he charged private patients and the Twenty-five Dollars ($25.00) per day which he would receive from Medicaid, he would agree to accept said Medicaid patients.

Zacher was tried and convicted of receiving bribes in connection with the providing of Medicaid services in violation of 42 United States Code 1396h(b)(1). The Second Circuit stated the issue as being whether the payments received by Zacher could be considered bribes or kickbacks within the meaning of the statute. The Court went on to hold that they could not be considered as such given the Federal case law construing

bribery as requiring an element of corruption, breach of trust or violation of a fiduciary duty.

As stated by the Second Circuit in *Zacher, supra*, the Legislative history concerning the statute in question is both sparse and inconclusive. Moreover, the Court reasoned that kickbacks, bribes and rebates cover a variety of transactions which, unless a public official is involved, would involve the misapplication of Federal funds as a necessary element. In other words, kickbacks, rebates and bribes would each involve a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use Federal funds only for intended purposes and only in the approved manner. *United States v. Zacher, supra*, at 916. Since the payments to Zacher did not increase the cost to the Government of patient care, nor did it decrease the quality of patient care purchased by the Government, there was no misapplication of Government funds and hence no kickback, bribe or rebate as proscribed by the statute.

In the instant Petition, as in *Zacher, supra*, the Government introduced no proof whatsoever that it had suffered a financial or pecuniary loss or that there was a misapplication of Federal funds. Faudman testified that Arnolds would bill the Government directly for any pharmaceutical supplies furnished to Medicaid patients at the nursing homes administered by the Petitioner. Therefore, the fact that Arnolds paid the Petitioner the sum of Four Hundred Sixteen Dollars ($416.00) per month in liquor neither increased the cost of the Medicaid program to the Government nor did it decrease or affect the quality of patient care. In short, the liquor received by the Petitioner cannot be considered a bribe or kickback under the statute as it existed at the time of his actions.

As stated *supra*, the Sixth Circuit expressly rejected the decision in *Porter, supra*, and distinguished the decision of the Second Circuit in *Zacher, supra*, on a nonexistent basis.

In essence, the Sixth Circuit has opted for a much broader definition of the terms "bribe, kickback or rebate" required as essential elements of the statute in opposition to all existing Federal law which mandates narrow construction of penal enactments.

Given this conflict in the Circuits on this important question of Federal statutory construction, it is respectfully urged that this most Honorable Court grant this Petition for Writ of Certiorari to resolve this matter.

CONCLUSION

For the foregoing reasons, Petitioner, Harold Perlstein, respectfully urges that this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be granted to resolve the conflict which has arisen among the Circuits.

Respectfully submitted,

(s) Ivan E. Barris (P10484)

(s) Michael H. Golob (P23118)
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(313) 964-5070

Dated: November 7, 1980.

APPENDIX "A"

United States of America vs.

United States District Court for THE EASTERN DISTRICT OF MICHIGAN

DEFENDANT: HAROLD PERLSTEIN

DOCKET NO. > E-80496

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH 9 DAY 21 YEAR 1979

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Ivan E. Berris (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of { [ ] NOT GUILTY. Defendant is discharged; [X] GUILTY. of sixteen (16) counts of the indictment.

Defendant has been convicted as charged of the offense(s) of soliciting and receiving kickback payments in violation of the United States Code, Title 42, Section 1396h(b)(1).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

one (1) year on each of sixteen (16) counts to be served concurrently as to each count. It is further ordered that defendant pay a committed fine of four thousand dollars ($4,000.00) on each count for a total fine of sixty-four thousand dollars ($64,000.00). Defendant is continued on his bond pending his appeal. All remaining counts of the indictment are ordered dismissed.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

It is ordered that the defendant be committed to the custody of the Attorney General and recommends.

COMMITMENT RECOMMENDATION

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE _____

BY _____ [ ] CLERK [ ] DEPUTY

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

John Feikens

DATE September 24, 1979

APPENDIX "B"

No. 79-5341

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. HAROLD PERLSTEIN, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 8, 1980

Before: MARTIN and JONES, Circuit Judges; DUNCAN, District Judge.*

PER CURIAM. Harold Perlstein was convicted of soliciting and receiving kickback payments in connection with the furnishing of medicaid services in violation of 42 U.S.C. § 1396h (b)(1). He was sentenced to one year of concurrent incarceration on each of sixteen counts and to pay a fine of $4,000 on each convicted kickback count. His argument for reversal is that the payments received were legally insufficient as a matter of law to constitute a bribe or kickback within the meaning of the statute in question.

The facts, largely undisputed, come from records introduced at trial. Perlstein was the administrator of two nursing homes, The Hamilton and The Avonside, located in Detroit. The patients were primarily Medicaid recipients, and their costs

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* Honorable Robert M. Duncan, United States District Court for the Southern District of Ohio, sitting by designation.

were federally funded. Perlstein selected the pharmacies and physical therapists who provided supplies and services to these nursing homes. In exchange for being given this business Perlstein successfully extracted sizeable cash payments from them. The payments were based upon a percentage of the reimbursed Medicaid payments. When the percentage arrangement failed Perlstein demanded and received a large monthly delivery of alcoholic beverages. When one drug supplier refused to go along with this plan he told him his services were no longer required.

As we read the record, the United States was able to prove that Perlstein entered into an agreement with Arnolds, Inc. to provide pharmaceutical items to the two nursing homes. Because the patients in both homes were Medicaid recipients, Arnolds submitted his statements for payment directly to the State of Michigan. In return for placing this substantial business with Arnolds, Perlstein demanded and received the equivalent of $416 per month in alcoholic beverages.

We must determine if these payments solicited and received by Perlstein constitute a violation of 42 U.S.C. § 1396h(b)(1)[1] which provides:

> (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any—
>
> > (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment . . . shall be guilty of a misde-

[1] This section was amended by Congress in 1977. The amended version removes all doubt that the conduct such as that involved in the present case violates the Act. Appellant here does not challenge the pre-1977 statute on which he was convicted as being unconstitutionally vague. However, that issue has been resolved recently by this court in *United States* v. *Tapert, et al.*, decided June 16, 1980, Nos. 79-5222-24, 79-5269-70. We held the pre-1977 statute is not invalid for vagueness because the challenged statute was sufficiently clear to give adequate notice that the alleged conduct was illegal.

> meanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

There have been several cases decided under this particular statute. In *Tapert, supra,* this court adopted the definition of kickback applied by the Seventh Circuit in *United States* v. *Hancock,* 604 F.2d 999 (7th Cir. 1978). We feel *Hancock* is most analogous to the present case. The physician charged sent blood and tissue specimens for Medicaid patients to Chem-Teck laboratory. Chem-Teck received payment for this work from Medicaid and divided it with the physician. The physician was charged with and found guilty of soliciting and receiving kickbacks in violation of § 1396h(b)(1). In deciding to affirm in *Hancock, supra,* the Seventh Circuit distinguished a Fifth Circuit decision now relied upon by appellant, *United States* v. *Porter,* 591 F.2d 1048 (5th Cir. 1979), stating in part, 604 F.2d at 1001, 1002:

> [T]he element of corruption is found in this allegation that the defendants received payments in return for their decision to send specimens to Chem-Teck. The potential for increased costs to the Medicare-Medicaid system and misapplication of federal funds is plain, where payments for the exercise of such judgments are added to the legitimate costs of the transaction.
>
> • • •
>
> The court in Porter also construed the term kickback to mean "the secret return to an earlier possessor of part of a sum received." 591 F.2d at 1054. We cannot agree that the term kickback is limited to a return of funds to an earlier possessor. The term is commonly used and understood to include "a percentage payment . . . for granting assistance by one in a position to open up or control a source of income," *Webster's Third New International Dictionary* (1966), and we think it was used in the statute to include such a payment. Here, of course, the defendants were able to open up or control the pay-

ment of federal funds to Chem-Teck by sending Medicare or Medicaid patients' tissue specimens to Chem-Teck; and the indictment alleges that they were paid for doing so. To the extent our conclusions are inconsistent with the *Porter* case, we decline to follow it.

The Second Circuit decision cited by appellant, *United States* v. *Zacher*, 586 F.2d 912 (2nd Cir. 1978), also fails to answer the question posed in the present case. In *Zacher* a nursing home charged the families of Medicaid recipients $4 more per day to cover costs. In the present case it is the secretive payments demanded by Perlstein from Arnold Pharmacies which made available the federal funds administered by the State of Michigan. Arnolds was not selected to service these Medicaid recipients for any reason other than a willingness to make payments to Perlstein.

The judgment of conviction of the District Court is affirmed.

APPENDIX "C"

42 UNITED STATES CODE 1396h

"§ 1396h. Offenses and penalties

"(b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any —

"(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, . . ."

"shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both."